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No. 90-1684

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT P. BREWER, Natural Guardian and Duly-Appointed Next Friend of ROBERT C. BREWER,
Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE CO.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Robert P. Brewer has petitioned this Court to review the Eighth Circuit's decision that ambiguous terms in an ERISA insurance plan are not subject to the axiomatic rule of construction that ambiguous terms in an insurance policy are construed in favor of the insured and against the insurer ("the contra insurer rule"). Respondent Lincoln National Life Insurance Company ("Lincoln National") essentially contends in its Brief In Opposition To Petition For A Writ Of

Certiorari ("Brief In Opposition") that the terms "mental illness" and "psychiatric care," without further definition in an insurance policy and based on their plain and ordinary meaning, are *unambiguous* and not susceptible to more than one interpretation. Accordingly, respondent contends that because the disputed terms allegedly are "unambiguous," this case does not present this Court with occasion to consider the applicability to ERISA plans of a rule of construction for *ambiguous* terms.

I. Because The Term "Mental Illness" *Is* Ambiguous, This Court Should Grant A Writ Of Certiorari And Reach The Questions Presented Regarding The Interpretation Of Ambiguous Terms In An ERISA Plan

This, however, is not a plain language case, notwithstanding respondent's argument. The terms "mental illness" and "psychiatric care" *are* ambiguous, and without further definition in respondent's policy could reasonably be interpreted by the average plan participant and the ordinary person to have meanings other than those advanced by respondent. Without restating arguments in the petition, it should suffice to reiterate that "mental illness" could reasonably be defined in various ways, including definition based upon either *cause* or *symptoms*. To understand the term's inherent ambiguity one need only consider the difficulty other courts have had in interpreting the term "mental illness." In addition to the opposing opinions in this case by the court of appeals and the district court, the *Kunin*, *Rosenthal* and *Arkansas Blue Cross* cases highlight the difficulty courts have had in interpreting "mental illness" or "mental disorder" as advocated by respondent. *See Kunin v. Benefit Trust Life Ins. Co.*, 696 F. Supp. 1342 (C.D. Cal. 1988), *aff'd*, 910 F.2d 534 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990) *reh'g denied*, 111 S. Ct. 803 (1991); *Rosenthal v. Mutual Life Ins. Co.*, 732 F. Supp. 108 (S.D. Fla. 1990);

Arkansas Blue Cross & Blue Shield, Inc. v. Doe, 22 Ark. App. 89, 733 S.W.2d 429 (1987) (en banc).

Lincoln National advances two principal arguments in support of its position that affective mood disorder is plainly a "mental illness" within the meaning of respondent's policies. First, Lincoln National contends that affective mood disorder is a "mental illness" because the symptoms of the illness include an effect upon Rob Brewer's emotions. Lincoln National contends that the cause of the symptoms is irrelevant, even if Rob Brewer's symptoms and illness arise from a physical, organic basis -- a chemical imbalance. Second, respondent advances the premise that the ordinary meaning of medical terms such as "mental illness" must be understood by the average plan participant or layperson in a vacuum and without reference to the current state of scientific and medical understanding. The flaws in the underlying premises for respondent's plain language argument are evident and will be rebutted in turn.

A. The Term "Mental Illness" Is Ambiguous Because It Reasonably Could Be Defined In More Than One Way, Including By Cause *Or* By Symptoms.

First, with reference to the term "mental illness," classification of an illness by symptoms rather than cause is clearly flawed and over-inclusive. Given the brain's physical relationship with the body and the effect of illnesses upon emotions and mental outlook, almost any disorder could be argued to be a "mental illness" under respondent's proposed definition. One need only consider a migraine headache, with its sudden onset, great pain and extended periods of acute and often disabling attack; Alzheimer's disease, with its symptoms of disorientation, forgetfulness, and personality changes; brain cancer, with its unpredictable symptoms that frequently affect behavior; a blood sugar disorder such as hypoglycemia, with its alternating highs and lows of mental and physical activity including euphoria and depression as the blood sugar level

changes. Given this nonexclusive list, it should be apparent that there are many *physical* disorders and illnesses that have effects that manifest themselves with "mental" symptoms. Applying respondent's logic, all of the above diseases or disorders would be excluded from major medical coverage as a "mental illness."

The uncontroverted evidence at trial established that affective mood disorder is a physical problem arising from a chemical imbalance. Evidence accepted by the district court established the reasonableness of distinguishing "mental" illnesses from "physical" illnesses based on their cause and not their symptoms. Clearly, the physical basis for any particular disorder is relevant to whether the disorder should be classified as a "mental illness." Accordingly, an ordinary person might reasonably define "mental illness" by cause rather than by symptoms, and therefore the undefined term "mental illness" is ambiguous.

B. It Is Unreasonable To Exclude A Physician's Knowledge Of Medical Advances From An Ordinary, Reasonable Person's Understanding Of Terms With A Medical Connotation.

Second, Lincoln National's attempt to exclude current scientific and medical knowledge from the common, ordinary meaning and understanding of terms in a health insurance policy inappropriately contorts the meaning of the terms by construing them based on the ignorance, prejudice or superstition of an uninformed population. Respondent's attempt to exclude current technical and medical understanding from the common and ordinarily understood meaning of terms with a medical or technical connotation ignores the physician-patient relationship and the fact that the ordinary person without expertise in medicine would defer to the understanding and explanation of the illness given by his or her doctor. In forming an understanding of an illness, the

ordinary person would consider relevant and adopt any knowledge gleaned from his or her physician.

Respondent's proposed construction of "mental illness" excludes any influence that knowledge gained from a physician may have on the average, ordinary person's understanding of the term "mental illness" and ignores advances in understanding based on medical and scientific discoveries. As set forth in the brief of National Depressive and Manic Depressive Association as Amicus Curiae in Support Of Petition Of Robert P. Brewer For Writ Of Certiorari at 8, diseases such as pneumonia, tuberculosis, influenza, syphilis and cerebral palsy were all at one time or another characterized or commonly thought to be "mental illnesses." Refusing to allow the common, ordinary and reasonable person to understand the true nature of a particular illness based on a technical and current explanation of the present state of medical understanding would operate to retain a common, ordinary meaning based on ignorance and prejudice. Certainly, we live in a rapidly changing world, particularly in the area of medicine and technology. Respondent inappropriately attempts to avoid coverage for a treatable physical ailment, based on outmoded concepts of what is a "mental illness."

C. Based On The Current Level Of Medical Knowledge, As Understood By The Ordinary Reasonable Person, The Term "Mental Illness" Is Ambiguous.

The appropriate legal standard for determining the common, ordinary meaning of medical terms like that at issue in this case is whether reasonable persons who have discussed their problems with their physician would understand affective mood disorder to be a "mental illness." The evidence at trial supported and the district court found that "the ordinary meaning a layperson would give" to the term "mental illness" was "as an illness that 'refers to a behavioral disturbance with no demonstrable organic or physical basis.'"

Brewer v. Lincoln National Life Ins. Co., 730 F. Supp. 292 (E.D. Mo. 1989), reprinted in Appendix B to the Petition at A-19. This Court should agree that the term "mental illness" is ambiguous, susceptible by the reasonable person to more than one meaning, and in particular susceptible to the meaning advanced by petitioner.

II. This Court Should Grant A Writ of Certiorari And Address Whether The Contra Insurer Rule Should Be Applicable To ERISA Insurance Plans.

Accordingly, this is not a plain language case. At issue is the applicability of the contra insurer rule that ambiguous terms in an insurance policy should be construed in favor of coverage of the insured. This axiomatic rule was long ago called "settled" by this Court. *Stroehmann v. Mutual Life Ins. Co.*, 300 U.S. 435, 439 (1937); *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U.S. 167, 174 (1923). Incorporation of this "settled" rule into ERISA is important, necessary and desirable as a matter of policy, regardless of whether the vehicle for inclusion is reference to state law or the fashioning of federal common law.

III. Conclusion

The questions presented therefore warrant this Court's grant of a writ of certiorari.

Dated this 13th day of June, 1991.

Respectfully submitted,

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